IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-1337

In re MERIDITH HOFFMAN PARTNERS, a Colorado general partnership; Meridith Millard Partners, a Nebraska general partnership, Debtors.

H. Christopher CLARK, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners and Meridith Millard Partners,

Plaintiff-Appellee,

v.

BALCOR REAL ESTATE FINANCE, INC., an Illinois corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Colorado.
No. 92-K-1003 - **John H. Kane, Jr.**, *Judge*

December 28, 1993
Rehearing Denied January 20, 1994

Before McKAY, ANDERSON, and EBEL, Circuit Judges.

STEPHEN H. ANDERSON, Circuit Judge.

Balcor Real Estate Finance, Inc. appeals on two grounds from the district court's decision affirming the bankruptcy

court's ruling that the trustee in bankruptcy could recover from Balcor preferential payments it received during the year preceding the bankruptcy petition. 145 B.R. 682. First, Balcor argues that the payments it received from the debtors, Meridith Hoffman Partners and Meridith Millard Partners, were not avoidable because they were made in the ordinary course of business. See 11 U.S.C. § 547(c)(2). Second, Balcor argues that the extended one-year preference period should not apply to the payments it received from the debtors. See id. § 547(b)(4)(B). We conclude that the debtors did not make the payments to Balcor "according to ordinary business terms" as required by section 547(c)(2)(C), and that the one-year preference period does apply. We therefore affirm the district court on both issues.

BACKGROUND

Meridith Hoffman Partners and Meridith Millard Partners were general partnerships that each owned and operated a single shopping center. Lawrence Fiedler was the controlling and managing general partner of both partnerships.

After buying their shopping centers at the end of 1984, both partnerships borrowed money from Balcor, a mortgage lender for commercial real estate developments. Meridith Hoffman borrowed $3,550,000 and Meridith Millard borrowed $5,300,000. Fiedler and the Meridith Organization, Inc. guaranteed both loans. Appellee's Supp.App. Tab 1. Although the loans were secured by deeds of trust and assignments of rents, Balcor was an undersecured creditor in bankruptcy because it did not perfect its assignments of rents before the bankruptcy petitions were filed.

The partnerships each signed escrow agreements with Balcor over a year after signing the original promissory notes. The bankruptcy court found that both partnerships

were in default when they entered the escrow agreements. *Clark v. Balcor Real Estate Finance, Inc. (In re Meridith Hoffman Partners)*, No. 91-1338-SBB, slip op. at 2-3 (Bankr.D.Colo. Apr. 30, 1992). Under the escrow agreements, the escrow agent deposited all rents from the shopping centers into an escrow account. The property manager could make disbursements from this account only after Balcor approved them.

Fiedler and others filed an involuntary Chapter 11 petition against the partnerships, which was later converted to a Chapter 7 liquidation, thirty-one months after the Meridith Hoffman escrow agreement was signed and seventeen months after the Meridith Millard escrow agreement was signed. The trustee sought to avoid as preferences for the benefit of an insider all payments to Balcor during the year preceding the bankruptcy petitions. During the preceding year, Meridith Hoffman had paid Balcor $140,128.94 and Meridith Millard had paid Balcor $255,722.44. The bankruptcy court held that the payments to Balcor were preferences for the benefit of an insider, and did not qualify for the ordinary course exception in section *1553 547(c)(2). The district court affirmed then Balcor appealed.

DISCUSSION

I. *Ordinary Course of Business Exception*

Balcor admits that the disputed transfers are preferences under section 547(b), but argues that they are not avoidable because they meet the ordinary course of business exception in section 547(c)(2). Balcor has the burden of proving that the payments qualify for the exception. See 11 U.S.C. § 547(g). The bankruptcy court concluded that the debtors did not make the payments in the ordinary course of business. Because this conclusion is primarily factual, we must accept it unless it is clearly incorrect. *Fidelity Sav. & Inv. Co. v.*

New Hope Baptist, 880 F.2d 1172, 1177 (10th Cir.1989) (per curiam).

The trustee may not avoid a preferential transfer if the underlying debt was incurred in the ordinary course of the parties' business, the payments were made in the ordinary course of the parties' business, and the payments were "made according to ordinary business terms." 11 U.S.C. § 547(c)(2). Because we conclude that the payments were not made according to ordinary business terms, we do not discuss whether they meet the other two requirements.

The Code does not define "ordinary business terms." The phrase could mean terms that creditors in similar situations commonly would use, even if the situation itself is extraordinary. *See Jones v. United Sav. & Loan Ass'n (In re U.S.A. Inns)*, 9 F.3d 680, 685 (8th Cir.1993) ("Subsection (c)(2)(C) . . . requires evidence of a prevailing practice among similarly situated members of the industry facing the same or similar problems."); *Morris v. Kansas Drywall Supply Co. (In re Classic Drywall, Inc.)*, 121 B.R. 69, 75 (D.Kan.1990) ("If an accepted or common practice of the industry, it is an 'ordinary business term.' "). Or it could mean terms that are used in usual or ordinary situations. We think that the purposes of the preference section suggest the latter meaning.

The purpose of the ordinary course exception is "to leave undisturbed normal financing relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." S.Rep. No. 989, 95th Cong., 2d Sess. 88 (1978), 1978 U.S.C.C.A.N. 5787, 5874. The preference section does not discourage "unusual action" simply because others in the industry wouldn't respond to similar circumstances in the same way. It discourages "unusual action" that may favor certain cred-

itors or hasten bankruptcy by alarming other creditors and motivating them to force the debtor into bankruptcy to avoid being left out. See *In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032 (7th Cir.1993); *Harman v. First Am. Bank (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479, 488 (4th Cir.1992) (holding that payments were in ordinary course because, although not common, they did not favor certain creditors or encourage a race to dismember the creditor); *Courtney v. Octopi, Inc. (In re Colonial Discount Corp.)*, 807 F.2d 594, 600 (7th Cir.1986) ("The obvious extra 'ordinary' transaction is one designed to give the transferee an advantage over other creditors in bankruptcy."), *cert. denied*, 481 U.S. 1029, 107 S.Ct. 1954, 95 L.Ed.2d 526 (1987). Ordinary business terms therefore are those used in "normal financing relations": the kinds of terms that creditors and debtors use in ordinary circumstances, when debtors are healthy. Such terms do not raise the dangers that the preference section seeks to avoid. Even arrangements that creditors commonly try to use when a debtor is struggling may give a creditor an advantage over others and precipitate bankruptcy. For example, filing a lawsuit to enforce a debt may not be unusual when a debtor does not pay, but payments according to a settlement agreement are not according to ordinary business terms. *Cf. Gull Air, Inc. v. Beech Acceptance Corp. (In re Gull Air, Inc.)*, 82 B.R. 1, 3-4 (Bankr.D.Mass.1988) (holding that payments according to a settlement agreement were not in the ordinary course of business because a lawsuit is an unusual collection method).

The escrow arrangement with Balcor was not a normal financing relationship. The record shows that creditors in the industry use such an arrangement only in extraordinary circumstances, when debtors are in trouble. Appellee's Supp.App. Tab 3, at 127, 129-32, 141-42. The record also suggests that Balcor entered the escrow agreement with the

debtors because the debtors were delinquent and Balcor was worried about getting paid. Id. at 70.[1] Furthermore, the escrow agreement enabled Balcor to favor itself. Balcor occasionally used this power to make sure that money was available for itself by denying other payments. The record supports the finding that Balcor used its authority to delay payments to other creditors and to pay its mortgage first. Id. Tab 6, at ¶ 6, Tabs 8-9.[2] Balcor also conditioned payments to trade creditors upon receipt of payments to itself and denied payment of certain expenses. See id. Tabs 10-13. The payments therefore were made according to terms that were not used in normal or ordinary situations and that made it possible for Balcor to favor itself, thus increasing the risk of bankruptcy as well. The payments to Balcor were not made according to ordinary business terms and do not qualify for the exception in section 547(c)(2).

II. *One-Year Preference Period*

The bankruptcy court held that the trustee could avoid the debtors' payments to Balcor made during the year preceding the bankruptcy filing. The court followed our prece-

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[1] The trustee claims that Balcor earlier admitted that the loans were in default when the escrow agreements were formed and now is estopped from arguing otherwise. Because the record sufficiently indicates at least that the escrow agreement was formed because of Balcor's concerns and the debtors' delinquency, and because s 547(c)(2)(C) is objective anyway, we do not address the trustee's judicial estoppel argument.

[2] Balcor argued for the first time in its reply brief that the documents at Tabs 8 and 9 were not admitted in evidence. After oral argument the trustee moved to supplement the record with pages 27 through 43 of the trial transcript to show that the documents were admitted. Although we could have reviewed the trial transcript in any event, we grant their motion to supplement the record and agree that the documents were admitted in evidence.

dent in reasoning that the extended one-year preference period applied because the payments were "for the benefit of" two "insiders," Fiedler and the Meridith Organization, who had guaranteed the debt to Balcor and who thereby received more on their contingent claims than they otherwise would have received. See 11 U.S.C. § 547(b); *Manufacturers Hanover Leasing Corp. v. Lowrey (In re Robinson Bros. Drilling, Inc.)*, 892 F.2d 850 (10th Cir. 1989) (per curiam) (adopting opinion in *Lowrey v. First Nat'l Bank (In re Robinson Bros. Drilling, Inc.)*, 97 B.R. 77 (W.D.Okla.1988)). Balcor argues that Robinson Bros. does not justify the extended preference period in this case and that if it does we should overrule it. We must accept the bankruptcy court's factual findings unless clearly erroneous, but we do not defer to its legal conclusions. *Fidelity Sav.*, 880 F.2d at 1174. We conclude that Robinson Bros. correctly interprets the Bankruptcy Code and does permit extended recovery in this case.

A. *Equal Treatment of the Outsider Creditor*

We disagree with Balcor's argument that the trustee should not be able to recover any payments made before the regular ninety-day preference period because the debtors did not treat Balcor better than other creditors. Although Congress intended the extended preference period to prevent unequal distribution motivated by benefit to insiders, the statute does not require any proof that the debtor actually did favor the insider, or the initial transferee in cases like this. The statute only requires proof that the insider received more on his claim than he would have received otherwise. 11 U.S.C. § 547(b)(5). Even if the debtor had no intention of favoring the insider, payments to an unsecured insider that are not in the ordinary course of business will be avoided up to one year before bankruptcy while similar

payments to other creditors will be avoided only up to ninety days. See *T.B. Westex Foods, Inc. v. FDIC (In re T.B. Westex Foods, Inc.)*, 950 F.2d 1187, 1195 (5th Cir.1992) (explaining that equality of distribution *1555 is equally important even if preferences were involuntary and debtor obviously was not intentionally preferring the creditor). It does not matter whether the debtors actually favored Balcor; all that matters in deciding whether to apply the extended preference period is whether the transfers that benefited the insider guarantors enabled them to receive more on their contingent claims than they would have received in bankruptcy without the transfers.

If the debtor truly does not treat the creditor any better than other creditors, the transfers usually will be in the ordinary course of business and thus will not be avoidable at all. Some courts have refused to allow extended recovery in insider guarantor cases because they thought that doing so would make the ordinary course defense meaningless by letting the trustee avoid transfers regardless of any defenses the outsider creditor may have. See *Performance Communications, Inc. v. First Nat'l Bank (In re Performance Communications, Inc.)*, 126 B.R. 473, 476-77 (Bankr.W.D. Pa. 1991). Even if a transfer is avoidable under section 547(b) because of benefit to a creditor other than the initial transferee, the exceptions apply to the transfers, not to the creditors. If a transfer was "in payment of a debt incurred . . . in the ordinary course of business," for example, it is not avoidable and cannot be recovered under section 550(a) from anyone, whether initial transferee or the creditor for whose benefit the transfer was made. However, as we have already explained, Balcor did receive special treatment in the manner of payment and thus has not proved that the disputed transfers were in the ordinary course of business.

B. *"For the Benefit of" Insider Guarantors*

The preference section will extend the preference period to one year only "if such creditor at the time of such transfer was an insider." 11 U.S.C. § 547(b)(4)(B). "Such creditor" refers to the only previous mention of creditor in section 547(b), which says that a preference must be "to or for the benefit of a creditor." Id. § 547(b)(1). Therefore the one-year preference period may apply only if the transfers were made "for the benefit of" an insider creditor.

Balcor does not dispute that Fiedler and the Meridith Organization were insiders and creditors, but argues that the payments were not for their benefit because they did not benefit financially. Balcor claims that the bankruptcy court incorrectly held that the insiders benefited by the delay of foreclosure, because considering non-pecuniary benefits as a benefit under (b)(1) is inconsistent with the requirement that the creditor receive more on his claim under (b)(5). See *Travelers Ins. Co. v. Cambridge Meridian Group, Inc. (In re Erin Food Servs., Inc.)*, 980 F.2d 792, 800-01 (1st Cir.1992) (holding that delaying bankruptcy proceedings was not a "benefit" to an insider because benefit under (b)(1) means only "a quantifiable monetary reduction in the insider-creditor's contingent claim").

We need not decide whether a delay in foreclosure is a benefit under (b)(1), however, because the bankruptcy court also correctly found that the insiders did benefit financially from the payments to Balcor. The court observed that the insider guarantors benefited from a reduction in their exposure on the guaranties. Clark, No. 91-1338-SBB, slip op. at 5. Reducing potential liability on the guaranties financially benefited the guarantors. See *Lowrey v. Manufacturers Hanover Leasing Corp. (In re Robinson Bros. Drilling, Inc.)*, 6 F.3d 701, 703 (10th Cir.1993) (explaining that insider guarantor clearly benefits from reduction in his con-

tingent liability and thus reduction in his contingent claim against debtor); *Erin Food Servs.*, 980 F.2d at 797 ("There can be no question that an insider-guarantor derives measurable economic benefit from a payment on the guaranteed debt, to the extent the insider's contingent liability on the personal guaranty is reduced."); *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1190, 1194 (7th Cir.1989).

Balcor argues that the insiders did not benefit from a reduction in potential liability because they were insolvent and soon to enter bankruptcy themselves, so they would never have had to pay on their guaranties anyway. Whether a transfer is for the benefit *1556 of a creditor is determined at the time of the transfer, however. *Robinson Bros.*, 6 F.3d at 704. At the time of the transfer, the insiders were still liable on their guaranties. A reduction in that potential liability is a benefit even if the guarantor is hopelessly insolvent. Id. at 703; *Official Unsecured Creditors Comm. of Suffola, Inc. v. U.S. Nat'l Bank (In re Suffola, Inc.)*, 2 F.3d 977, 986 (9th Cir.1993) ("Insolvency is transitory, or at least not inherently permanent. A decrease in the degree of insolvency, like an increase in the degree of solvency, is beneficial.").

C. *"Such Creditor" Received More Than in Bankruptcy*

As we already have explained, subsection (b)(5) requires that the insider creditor received more of his contingent claim than he would have received in bankruptcy. See *Ray v. City Bank & Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490, 1493 (6th Cir.1990) (noting that (b)(1), (4), and (5) all refer to the same creditor, so the one-year period applies only if the insider guarantor received more than he would have otherwise). Regardless of whether non-pecuniary benefits satisfy (b)(1), the trustee must always prove that the insider guarantor benefited financially as described in (b)(5).

Although the bankruptcy court mistakenly considered whether Balcor received more than it would have received in bankruptcy, the record clearly shows that the insider guarantors also received more on their contingent claims against the debtors than they would have received in bankruptcy. The payments to Balcor simultaneously reduced the insiders' contingent claims against the debtors. Because the insider guarantors were unsecured, they would have received only a fraction of those amounts in bankruptcy. See *Elliott v. Frontier Properties (In re Lewis W. Shurtleff, Inc.)*, 778 F.2d 1416, 1421 (9th Cir.1985); Appellee's Supp. App. Tab 16.

Again, Balcor insists that the insider guarantors did not receive anything from the transfers because the insiders were insolvent and would not have had to pay on their guaranties in any event. However, (b)(5) does not say that the creditor ultimately must have benefited from receiving more on his claim. Actual benefit is irrelevant because the preference section is not strictly punitive. One of its primary purposes is to assure equality of distribution according to the statutory scheme. If the debtor favored a certain creditor because it reduced an insider's exposure, it would not matter whether the insider guarantor ultimately did not have to pay on the guaranty. The debtor still spent money that would have been part of the estate and available for fair distribution to all creditors. The result might be different if the insider was discharged in bankruptcy before the debtor's bankruptcy filing, because then the insider would not have a claim at all in the debtor's bankruptcy, but that is not the case here. See *Suffola*, 2 F.3d at 986.

We therefore conclude that the insider guarantors did receive more on their claim, regardless of their insolvency and eventual bankruptcy, and that Robinson Bros. supports extending the preference period in this case.

D. *Arguments to Overrule Robinson Bros.*

Balcor also offers several reasons that we should overrule Robinson Bros. if we conclude that it does apply in this case. However, a three-judge panel cannot overrule an earlier decision by the circuit. See, e.g., *United States v. Rockwell,* 984 F.2d 1112, 1117 (10th Cir.), *cert. denied,* __ U.S. __, 113 S.Ct. 2945, 124 L.Ed.2d 693 (1993). Even if we could, Balcor's arguments do not justify overruling Robinson Bros. First, Balcor complains that permitting extended recovery in insider guarantor cases raises the cost of commercial capital because lenders can't rely as much on insider guaranties. See *Weiskopf v. New York Job Dev. Auth. (In re J.T.L. Supermarket Corp.),* 145 B.R. 3, 4 (Bankr. N.D.N.Y.1992). Balcor also argues that it unfairly penalizes prudent lenders who get borrower guaranties. See *Official Creditors' Comm. of Arundel Hous. Components, Inc. (In re Arundel Hous. Components, Inc.),* 126 B.R. 216, 219 (Bankr.D.Md.1991). Such considerations may motivate *1557 Congress to amend the statute, but they do not permit courts to disregard the clear language of a statute. See *Union Bank v. Wolas,* __ U.S. __, __, 112 S.Ct. 527, 531, 116 L.Ed.2d 514 (1991) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning."); *C-L Cartage,* 899 F.2d at 1494.

Second, Balcor argues that recently proposed congressional amendments that would eliminate this practice suggest that courts have misunderstood the statute. See S. 540, 103d Cong., 1st Sess. (1993); 138 Cong.Rec. S8357, S8359 (daily ed. June 17, 1992). Of course, the proposed amendments instead may mean that Congress has recognized the consequences of the present rule and decided that they should change it. The statute permits recovery from the initial transferee even though the transfer was avoidable

only because it benefited the insider. The statute means what it says even if Congress has thought better of it.

Next, Balcor complains that it is "grossly unfair" to take money from the initial transferee only because it benefited an insider guarantor, especially in this case where the initial transferee was protecting other creditors through an escrow arrangement. Appellant's Br. at 27, 29. However, the courts' equitable powers do not permit them to disregard the clear language of the statute, regardless of how unfair it may seem to be. See, e.g., *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 968, 99 L.Ed.2d 169 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."). Section 550(a)(1) clearly permits recovery from the initial transferee if the transfer is avoidable under section 547(b). *Robinson Bros.*, 97 B.R. at 80; *Levit*, 874 F.2d at 1194. Furthermore, we disagree that it is unfair. Regardless of the outsider creditor's culpability, fairness to the other creditors requires the creditor to return to the estate any payments it might not have received had they not benefited an insider. See *Suffola*, 2 F.3d at 980-81; *Levit*, 874 F.2d at 1198; cf. H.R.Rep. No. 595, 95th Cong., 1st Sess. 178 (1977), 1978 U.S.C.C.A.N. 5787, 5963, 6139 ("[A] creditor's state of mind has nothing whatsoever to do with the policy of equality of distribution, and whether or not he knows of the debtor's insolvency does little to comfort creditors similarly situated who will receive that much less from the debtor's estate as a result of the prebankruptcy transfer to the preferred creditor."). In some cases, unlike this one,[3] there may be no evi-

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[3] The bankruptcy court found that the insider guarantors were very concerned about releasing their guaranties, suggesting that they had reason to favor Balcor to forestall foreclosure and reduce their exposure. Clark, No. 91-1338-SBB, slip op. at 5.

dence at all that the debtor's preference of an outsider creditor was motivated by the benefit to an insider guarantor. But Congress chose to avoid transfers satisfying objective criteria that suggested a high risk of favoritism rather than requiring proof of subjective intent. Considering the likelihood of favoritism when the objective criteria are met and the difficulty of proving preferential intent, the objective approach does not seem unfair.

Finally, Balcor argues that there are actually two transfers involved—the payment to Balcor and the resulting reduction in exposure to the insiders—and only the latter is avoidable. See, e.g., *In re Aerco Metals, Inc.*, 60 B.R. 77, 79 (Bankr.N.D.Tex.1985). Every circuit that has considered the issue has rejected this theory and allowed extended recovery. See *Suffola*, 2 F.3d at 981-82; *C-L Cartage*, 899 F.2d at 1494-95; *Robinson Bros.*, 97 B.R. at 79-80; *Levit*, 874 F.2d at 1195-96. This "two-transfer" theory incorrectly defines transfer as a benefit received instead of property disposed. See 11 U.S.C. § 101(54) (defining "transfer" as "disposing of or parting with property" by any means); *C-L Cartage*, 899 F.2d at 1495. The two-transfer theory also mistakenly assumes that benefits to creditors, rather than transfers, are avoidable. See *Levit*, 874 F.2d at 1195-96. The theory therefore implies that the only reason for the preference section is to punish culpable creditors, rather than to recover money that may have been unfairly paid out by the debtor. Both the text of the *1558 statute and its underlying purposes favor extending recovery from the initial transferee if the transfers preferred an insider guarantor. We therefore AFFIRM the district court's ruling that the trustee may recover the transfers to Balcor made during the year preceding the filing of bankruptcy.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: MERIDITH HOFFMAN PARTNERS, a Colorado general partnership; MERIDITH MILLARD PARTNERS, a Nebraska general partnership,	)	
Debtors.	)	
H. CHRISTOPHER CLARK, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners and Meridith Millard Partners,	)	
Plaintiff-Appellee,	)	
v.	)	No. 92-1337
BALCOR REAL ESTATE FINANCE, INC., an Illinois corporation,	)	
Defendant-Appellant.	)	

ORDER
Entered January 20, 1994

Before ANDERSON, MCKAY and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

ROBERT L. HOECKER, Clerk

Patrick Fisher
Chief Deputy Clerk

[Dated 9-30-92]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 92-1337	)	
	)	
In re:	)	
	)	
MERIDITH HOFFMAN PARTNERS, a Colorado general partnership, and MERIDITH MILLARD PARTNERS, a Nebraska general partnership,	)	
	)	
Debtors.	)	Civ. A. No. 92-K-1003
	)	
----------	)	Bankruptcy Nos. 89 B 06180 C 89 B 06181 C 89 B 06181 E
H. CHRISTOPHER CLARK, Trustee of the Bankruptcy Estates of Meridith Hoffman Partners and Meridith Millard Partners,	)	
	)	
Plaintiff/Appellee/Cross-Appellant,	)	
	)	September 30, 1992
v.	)	
	)	
BALCOR REAL ESTATE FINANCE, INC., an Illinois corporation,	)	
	)	
Defendant/Appellant/Cross-Appellee.	)	

MEMORANDUM DECISION ON APPEAL

KANE, Senior District Judge.

This case is before me on cross-appeals from a decision of the bankruptcy court. In its ruling below, the bankruptcy court concluded that the trustee could properly avoid certain preferential transfers (totalling nearly $400,000) the debtors, Meridith Hoffman Partners ("Hoffman") and Meridith Millard Partners ("Millard") (collectively "the partners"), made in the one-year period before they filed for bankruptcy protection and reorganization under chapter 11. The partners paid the sums to Balcor Real Estate Finance Inc., ("Balcor") an Illinois corporation which made loans totalling 8 million to the partners in 1985 and 1986.

Balcor argues in this appeal that the bankruptcy court wrongly concluded 1) that the partners were insolvent during the one-year preference period; 2) that the transfers benefitted certain insider-guarantors of the notes in question; 3) that it would have received less under a chapter 7 petition; and 4) that the transfers were the result of an unusual debt collection practice not made in the ordinary course of business. For the reasons discussed below, I affirm the bankruptcy court's judgment.

The trustee argues, in the cross-appeal, that the bankruptcy court wrongly concluded that Balcor was not a controlling insider under 11 U.S.C. § 547(b)(5). He asserts that the bankruptcy court should have found § 547(b)(5) an alternate basis under which to extend the preference period from 90 days to 1 year. I disagree, and accordingly affirm that portion of the bankruptcy court judgment as well.

I. *Facts and Procedural History*

Millard and Hoffman are, respectively, Nebraska and Colorado general partnerships organized in 1985 to develop shopping centers in the two states. Millard's partners included Meridith Plaza, Inc., Lawrence E. Fiedler and Greg

Rice. Hoffman's partners included Mer-Hof, Inc., Fiedler and Rice. In September, 1986, Millard executed two promissory notes totalling 5.3 million dollars in favor of Balcor secured by a first deed of trust and an assignment of rents which were later recorded in the appropriate county in Nebraska. Fiedler and the Meridith Organization guaranteed the promissory notes. Hoffman financed 3.5 million of the purchase price with a Balcor loan and note dated January 30, 1985, secured by a second deed of trust and an assignment of rents. Again, Fiedler and Meridith Organization both executed guaranties of the underlying note.

Hoffman executed an escrow agreement with Balcor and Jesse Lipschuetz, Esq., on October 3, 1986. Millard entered a similar escrow agreement on December 1, 1987. Both partners were delinquent and in default under the terms of the promissory notes when they entered into the escrow agreements. Under the terms of the escrow agreements, rents from the two properties were deposited to Lipschuetz's account. The respective property managers would regularly submit disbursement requests to Balcor and Lipschuetz which Balcor would review, comment on, reject or approve. The partners and the property manager retained primary control over day-to-day management and personnel decisions, while Balcor primarily exercised fiscal monitoring and supervising. Balcor approved nearly all submitted disbursement requests, except for a few involving the partners or insiders.

Involuntary petitions under chapter 11 were filed against the partners on May 8, 1989. The cases were converted to chapter 7 proceedings in August, 1990. The trustee filed a complaint to recover preferential transfers on April 26, 1991. In a joint pre-trial statement filed on February 21, 1992, the parties stipulated, among other things, that the partners were insolvent at the time of the transfers

and during all time periods relevant to the adversary proceeding. On March 13, 1992, after reviewing some of the trustees proposed exhibits (uncertified financial statements of the partners), Balcor notified the trustee that it would no longer be bound by its stipulation of insolvency. When it reviewed the exhibits, assertedly for the first time after February 21, 1992, it determined that the uncertified financial statements of the partners "did not establish the insolvency or solvency of either" of the partners. Appellant's opening Brief at 18. It claims that the financial statements were incomplete because they failed to take into account Hoffman and Millard's general partners' net worth. It offered, however, no evidence to suggest that the bankruptcy court would not have found the partners insolvent if it had considered those general partners net worth. The bankruptcy court held a hearing on the complaint on March 18, 1992. As a pre-trial matter, it refused to release Balcor from its joint pre-trial stipulation of insolvency. The bankruptcy court entered a written order on April 30, 1992 sustaining the complaint and ordering Balcor to return the funds it received in the year before the petitions were filed. These appeals followed.

II. *Discussion*

11 U.S.C. § 547(b)[1] broadly authorizes trustees to avoid

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[1] Except as provided in subsection (c), the trustee may avoid any transfer of an interest of the debtor in property—(1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made—(A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an in-

(continued...)

transfers of a debtor's interest in property "if five conditions are satisfied and unless one of seven exceptions defined in subsection (c) is applicable."[2] *Union Bank v. Wolas,* 112 S.Ct. 527, 529, 116 L.Ed.2d 514 (1991). Balcor's appeal is only concerned with three of the five conditions and one of the exceptions. Balcor argues that no insiders received any benefit from the transfers [§ 547(b)(1) and (b)(4)(B)], that the partners were not insolvent at the time of the transfers [§ 547(b)(3)], and that it would not have received any lesser amount under a chapter 7 case [§ 547(b)(5)]. Finally, it argues that the transfers were made strictly in the ordinary course of business between itself and the partners [§ 547(c)(2)].

A. *Forbearance as Non-Pecuniary Benefit*

The bankruptcy court concluded that the preference period was properly extended pursuant to § 547(b)(4) to one year by virtue of a benefit to two insiders, Fiedler and Meridith Organization. Each had signed as guarantors on the notes. The bankruptcy court found, on the strength of *Levit v. Ingersoll Rand Financial Corp. (In re Deprizio)*, 874 F.2d 1186 (7th Cir.1989), and *Manufacturers Hanover Leasing*

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[1] (...continued)
sider; and (5) that enables such creditor to receive more than such creditor would receive if—(A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. 11 U.S.C. § 547(b).

[2] The trustee may not avoid under this section a transfer—(2) to the extent such transfer was—(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; and (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms. 11 U.S.C. § 547(c)(2).

Corp. v. Lowrey (In re Robinson Bros. Drilling Inc.), 892 F.2d 850 (10th Cir.1989), that the insider-guarantors had benefitted from the partners' payments to Balcor. It found benefit in Balcor's forbearance and willingness not to foreclose on the property or bring suit on the guarantees until after entry of the orders from relief for stay.

Balcor claims there was no factual support for the bankruptcy court's opinion because there was no evidence of forbearance. Since I review this claim on the clearly erroneous standard, I disagree. In the first place, it is not disputed that Balcor did not move to foreclose or otherwise protect its interests while the partners were making payments under the escrow agreements. This is true, despite the fact that the partners were insolvent and delinquent on their payments when they signed the escrow agreements. Furthermore, the bankruptcy court understood exhibits DDDD, EEEE, and FFFF to show that the guarantors were concerned about the release of their guaranties in the year immediately proceeding the bankruptcy filing. The bankruptcy court's finding of benefit to insider-guarantors by forbearance is thus not clearly erroneous.

Balcor also claims that *Robinson Bros.* and *Deprizio* do not apply where there is no pecuniary benefit to the insider-guarantors. In *Deprizio*, the seventh circuit held that the trustee could recover a transfer from an initial transferee where the transfer is a preference only as to an insider of the debtor and not as to the initial transferee. Only two other circuits have adopted a similar position. *Ray v. City Bank & Trust Co. (In re C-L Cartage Co., Inc.*, 899 F.2d 1490 (6th Cir.1990)); *Manufacturers Hanover Leasing v. Lowrey (In re Robinson Bros. Drilling, Inc.)*, 892 F.2d 850 (10th Cir.1989).

Most courts have held that a trustee may not recover from a non-insider creditor under these circumstances. *See,*

e.g., In re Performance Communications, Inc., 126 B.R. 473, 475 n. 3 (W.D.Penn.1991). Indeed, I find few boisterous boosters of the *Deprizio* approach. *See, In re Performance Communications*, 126 B.R. at 476 (describing the *Deprizio* analysis as analytically unmeaningful and fatally flawed in several respects); *In re Arundel Housing Components, Inc.*, 126 B.R. 216, 219 (Bankr.D.Md.1991) ("It represents an incorrect interpretation of the law whose application would subvert justice, produce much needless mischief and create an unfortunate result in this case."); and Godshall, Pettigrew, Musselman & Brooke, *Two Years Later: Eight Questions Left Unanswered (or Extremely Confused) by Deprizio*, 19 Cal.Bankr.J. 41, 61 (1991) (suggesting that the benefit is technical, not practical, only a matter of timing, not true benefit, and not the type of benefit envisioned by the Code.). As much as I agree that *Deprizio* and *Robinson Bros.* produce flawed results, I am nonetheless bound by the circuit's opinion. To the extent that Balcor urges that *Robinson Bros.* and *Deprizio* were wrongly decided and represent an incorrect interpretation of the bankruptcy code, it must address its arguments to a higher authority.

B. *Insolvency & § 547(b)(3)*

Balcor asserts that it should be relieved of its stipulation of insolvency because it entered into the stipulation before it was able to review the trustee's proposed evidence concerning insolvency. Balcor points me to the circuit's opinion in *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 570 F.2d 899, 902 (10th Cir.1978), for the proposition that a court may relieve a party from an improvident agreement if the original agreement will cause manifest injustice. Noting that the law favors disposition of litigation on the merits, it claims the bankruptcy court abused its discretion when it forced the stipulation on Balcor. I review

the bankruptcy court's decision on an abuse of discretion standard.

The cases provide no bright line to determine when it is appropriate to release a party from an earlier Fed.R.Civ.P. 16 stipulation. I am variously instructed to prevent hardship to the parties, to prevent manifest injustice and avoid a return to "the old sporting theory of justice," and to allow amendments or modifications where there is little risk of surprise and prejudice to the opposing parties. See generally 6A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1527 at 284-86 (1990). The rule does not apply, however, where the evidence or issue was within the knowledge of the party seeking modification at the time of the stipulation. In such cases, the trial court should not allow the modification. *Burnett v. Dresser Industries, Inc.*, 849 F.2d 1277 (10th Cir.1988).

Here, I do not see how the bankruptcy court abused its discretion. Balcor has made no factual showing that it suffered prejudice by being held to its stipulation. During the hearing, it offered no evidence that the presence of the general partners' net worth would significantly alter the financial equation. Nor was it able to show that there would be little or no prejudice to the trustee if, five days before trial, he suddenly had to produce the documents and witnesses necessary to prove insolvency. Finally, I note that the trustee filed his adversary complaint more than a year before the case proceeded to trial. During that time, Balcor had ample opportunity to determine through the usual discovery processes the true solvency of the partners. Its failure to do so should not be laid at the trustee's doorstep.

C. Evidence of a Lesser Amount—§ 547(b)(5)

Balcor urges me to reverse the bankruptcy court's decision that the transfers allowed it to receive more than it would have received under chapter 7 pursuant to 11 U.S.C. § 547(b)(5). I decline to so rule.

The bankruptcy court found that Balcor was a nonrecourse creditor of both estates on the date the partners filed for protection. It found that although Balcor had recorded an assignment of rents, Balcor did not perfect its interests in the rents until the post-petition filing of its notices pursuant to 11 U.S.C. § 546(b). *See Consolidated Capital Income Trust v. Colter, Inc.*, 47 B.R. 1008 (D.Colo.1985). As a non-recourse creditor, Balcor would have been entitled to receive nothing in a chapter 7 proceeding. See 11 U.S.C. § 1111(b)(1)(A); *In re PCH Associates*, 949 F.2d 585, 604 (2d Cir.1991).

Balcor does not contest this finding, it simply ignores it. It argues, instead, that the bankruptcy court should have performed a distribution analysis to determine whether it obtained a greater return on its claim than it would have otherwise by surrendering the payments. Even assuming Balcor should be considered an unsecured creditor, I disagree. The trustee testified without contradiction that payments to the unsecured creditors would be less than 100%. In such a situation, the preferential payments to an unsecured creditor allow it to receive more than it would in a chapter 7 proceeding. *Palmer Clay Products Co. v. Brown*, 297 U.S. 227, 229, 56 S.Ct. 450, 450, 80 L.Ed. 655 (1936); *Elliot v. Frontier Properties (In re Shurtleff, Inc.)*, 778 F.2d 1416, 1421 (9th Cir.1985)); *In re Buyer's Club Markets, Inc.*, 123 B.R. 895 (Bankr.D.Colo.1991). I accordingly affirm the bankruptcy court's decision in this respect as well.

D. *Ordinary Course of Business—§ 547(c)(2)*

Balcor's final argument is that the payments were made in the ordinary course of business and did not arise out of unusual debt collection or payment practices. To satisfy the ordinary course of business exception, a creditor must show that the payments were made in the ordinary course of the creditor's business, made according to ordinary business terms, and made in the ordinary course of business. *Union Bank v. Wolas*, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991). The defense is available for both short-term and long-term debt obligations. *Id.* Ordinary course of business payments do not include payments which arise out of an unusual debt collection or payment practice. *Marathon Oil Co. v. Flateau (In re Craig Oil Co.)*, 785 F.2d 1563 (11th Cir.1986); *In re Miniscribe*, 123 B.R. 86 (Bankr.D.Colo.1991). In general, I must look to the parties' earlier business conduct, the common industry practice, and specifically, whether the payment resulted from any unusual action by either the debtor or creditor. *Xtra, Inc. v. Seawinds Ltd. (In re Seawinds Ltd.)*, 888 F.2d 640 (9th Cir.1989); *Courtney v. Octopi, Inc. (In re Colonial Discount Corp.)*, 807 F.2d 594, 600 (7th Cir.1986); *Waldshmidt v. Ranier (In re Fulghum Const. Corp.)*, 872 F.2d 739 (6th Cir.1989).

The bankruptcy court's findings are not clearly erroneous and are supported by the record. First, the parties' earlier conduct did not include an escrow or lockbox arrangement. It only included an ordinary promissory note and deed of trust. The escrow agreements were not entered into at the time of the loans. The one was executed nearly 21 months after the corresponding note, the other nearly fifteen months later. Second, there was little evidence tending to show that such lockbox arrangements were used commercially or within the industry except when a loan was in default, where the lender was preparing to foreclose, or where

there were other lender relationship problems. Finally, the preferential payments clearly resulted from unusual action on both the debtor and creditor's part. The escrow agreements came into being only after the partners were insolvent and in default on their loans as a way to satisfy Balcor that the rents would not disappear without paying Balcor and the other trade creditors. The bankruptcy court properly treated such an arrangement as an unusual collection effort on Balcor's part. I therefore conclude that the bankruptcy court ruled correctly when it refused to dismiss the complaint on the basis that there was no unusual debt collection practice.

III. *The Trustee's Cross-Appeal*

The trustee argues that the bankruptcy court erred when it concluded that Balcor was not a controlling insider within the meaning of § 547(b)(4)(B) and § 101(31). I disagree.

Under 11 U.S.C. § 101(31)(C)(V), an insider includes one who is in control of the debtor. Case law teaches that I must look to the totality of the circumstances to determine when a creditor has assumed control of the debtor. *In re Finn*, 909 F.2d 903 (6th Cir.1990). In order to control a debtor, a creditor must be so powerful that the debtor becomes a mere instrument or agent of the creditor, unable to make independent policy and personnel decisions. The cases distinguish, however, the creditor who merely takes a sentinel-like position vis-a-vis the debtor, thereby keeping careful watch over the borrower's activities. *In re Aluminum Mills Corp.*, 132 B.R. 869 (Bankr.N.D.Ill.1991); *Gray v. Giant Wholesale Corp.*, 758 F.2d 1000 (4th Cir.1985); *In re Practical Investment Corp.*, 95 B.R. 935 (Bankr. E.D.Va.1989).

I agree with the bankruptcy court's conclusion that Balcor had good cause to monitor the partners's expenses and operations, especially since the loans were in default. Beyond that, the partners retained ultimate control of their destiny. They made day-to-day operating and personnel decisions and exercised general control over the business operations. While it may be true in some cases that "he who has his thumb on the purse has the power,"[3] the mere ability to control does not always equate to control within the meaning of 11 U.S.C. § 101(31)(C)(V). I accordingly affirm the bankruptcy court's decision in this regard as well.

DATED at Denver, Colorado this 30th day of September, 1992.

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[3] Otto Von Bismarck, Speech to the North German Reichstag (March 11, 1869) quoted in J. Bartlett Familiar Quotations 553 (E.Beck Ed.1980).

[Dated April 30, 1992]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	Bankruptcy Case No.
	)	89-B-06180-C
MERIDITH HOFFMAN PARTNERS,	)	89-B-06181-E
a Colorado general partnership,	)	
and	)	
MERIDITH MILLARD PARTNERS,	)	
a Nebraska general partnership,	)	
	)	
Debtors.	)	
	)	
----------	)	
	)	
H. CHRISTOPHER CLARK, Trustee	)	
of the Bankruptcy Estates of	)	
Meridith Hoffman Partners and	)	
Meridith Millard Partners,	)	
	)	
Plaintiff,	)	
	)	Adversary Proceeding
v.	)	No. 91-1338-SBB
	)	
BALCOR REAL ESTATE	)	
FINANCE, INC.,	)	
an Illinois corporation,	)	
	)	
Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS COURT, having conducted a one-day trial in this matter, having received and reviewed exhibits, and having examined the file, makes the following findings of fact and

conclusions of law, and issues the following order with respect to the Trustee's claims, pursuant to 11 U.S.C. § 547, against Defendant Balcor Real Estate Finance, Inc.

1. *Meridith Millard Partners.*

Meridith Millard Partners is a general partnership organized under the laws of the State of Nebraska pursuant to an amended partnership Agreement dated January 1, 1985. The general partners of Meridith Millard include Meridith Plaza, Inc., Lawrence E. Fiedler and Greg Rice. During all time periods relevant to the Complaint, Meridith Millard was involved in the business of owning, managing and developing a shopping center known as Millard Plaza located in Omaha, Nebraska. Meridith Millard acquired the Millard Plaza Shopping Center in December 1984, for the approximate sum of $6,250,000.00.

On September 8, 1986, Meridith Millard executed a $5,000,000.00 promissory note and a $300,000.00 promissory note in favor of Balcor ("Balcor-Millard Note"). These notes were secured by a first deed of trust on the Meridith Millard Plaza dated September 8, 1986, and an assignment of rents in favor of Balcor also dated September 8, 1986. The first deed of trust and assignment of rents were recorded in the records of Douglas County, Nebraska. The Balcor-Millard Note was further guaranteed by Lawrence E. Fiedler and the Meridith Organization pursuant to a guaranty of secured promissory note dated September 8, 1986.

On December 1, 1987, Meridith Millard, Balcor, and Jesse N. Lipschuetz, P.C., a Denver attorney, executed an Escrow Agreement. At the time the Escrow Agreement was executed Meridith Millard was in default under the terms of the Balcor-Millard Note.

An Involuntary Petition was filed against Meridith Millard on May 8, 1989.

2. *Meridith Hoffman Partners.*

Meridith Hoffman Partners is a general partnership organized under the laws of the State of Colorado pursuant to an Amended Agreement of General Partners dated January 1, 1985. The general partners of Meridith Hoffman include Mer-Hof, Inc., Lawrence E. Fiedler and Greg Rice. During all time periods relevant to the Complaint, Meridith Hoffman was engaged in the business of owning, managing and developing real property known as the Hoffman Heights Shopping Center, located in Aurora, Colorado.

Meridith Hoffman Partners purchased the property known as the Hoffman Heights Shopping Center located at 606 Peoria Street, Aurora, Colorado from Hoffman Heights Shopping Center, Ltd. in December 1984. Of the $9,037,000.00 purchase price, $5,950,000.00 was financed by a $5,950,000.00 purchase money loan from Hoffman Heights evidenced by a Promissory Note dated December 28, 1984, and secured by a First Deed of Trust and Assignment of Rents on the Hoffman Property ("Hoffman Heights Note"). The remainder of the purchase price was financed by a loan from Balcor in the amount of $3,550,000.00, evidenced by a Promissory Note dated January 30, 1985, payable to Balcor and secured by a Second Deed of Trust and Assignment of Rents ("Balcor-Hoffman Note"). The Deed of Trust and Assignment of Rents was recorded with the Clerk and Recorder for Arapahoe County, Colorado. Lawrence E. Fiedler, a general partner and the Meridith Organization executed guaranties of the Balcor-Hoffman Note dated January 30, 1985.

On October 7, 1986, Balcor and Meridith Hoffman executed a Modification Agreement and an Amended and Restated Secured Promissory Note dated October 8, 1986. On October 3, 1986, Meridith Hoffman, Balcor and Jesse N. Lipschuetz executed an Escrow Agreement. At the time of the execution of the Escrow Agreement, Meridith Hoffman was in default under the terms of the Balcor-Hoffman Note.

An Involuntary Petition was filed against Meridith Hoffman on May 8, 1989.

3. *Escrow Agreements.*

During the time periods relevant to the action, Banc Properties served as property manager for both the Hoffman Heights Shopping Center and the Meridith Plaza Shopping Center. During the periods relevant to the Complaint, both Debtors were operating under the terms of the Escrow Agreements with Balcor. Pursuant to the terms of the Escrow Agreements, the rents from the properties were deposited with Jesse N. Lipschuetz, P.C. Banc would submit disbursement requests of invoices to be paid to Balcor and Jesse N. Lipschuetz, P.C. Balcor would review the disbursement requests and would comment, occasionally question, perhaps reject, or otherwise respond to Mr. Lipschuetz respecting same. Management and operations remained primarily and essentially with Debtors' personnel and Banc. Balcor exercised monitoring and some supervisory responsibilities on matters relating to property finances and expenditures, but the Debtors and Banc Properties remained in control.

4. *Elements of Preferential Transfer.*

A. *Transfers of an Interest of the Debtors in Property to and for the Benefit of a Creditor Under § 547(b)(1).*

The Court finds and the parties have stipulated that during the 90-day period prior to the filing of the bankruptcy, Meridith Millard transferred $50,500.00 to Balcor and further that during the period between 90 days and one year prior to the filing of the bankruptcy, Meridith Millard transferred $201,222.44 to Balcor.

The Court finds and the parties have stipulated that during the 90-day period prior to the filing of the bankruptcy, Meridith Hoffman transferred $18,000.00 to Balcor and further that during the period between 90 days and one year prior to the filing of the bankruptcy, Meridith Hoffman transferred $122,128.94 to Balcor.

The Trustee has asserted that the transfers were made as set forth in the Debtors' Statement of Financial Affairs. This position was adopted by Balcor during its argument at trial. The Court accordingly finds that the transfers were made as follows:

i) Meridith Hoffman within 90 days, $18,000.00 as follows:

03/30/89	$ 8,000.00
04/28/89	$ 10,000.00

ii) Meridith Hoffman within one year, $122,128.94 as follows:

05/16/88	$ 27,572.69
06/14/88	$ 28,491.78
09/06/88	$ 27,572.69
10/14/88	$ 28,491.78
01/09/89	$ 10,000.00

iii) Meridith Millard within 90 days, $50,500.00 as follows:

03/02/89	$ 30,000.00
03/30/89	$ 5,500.00
04/19/89	$ 15,000.00

iv) Meridith Millard within one year, $201,222.44 as follows:

10/27/88	$126,722.44
11/15/88	$ 15,500.00
12/20/88	$ 31,000.00
01/26/89	$ 28,000.00

B. *Payments Made on Account of an Antecedent Debt Pursuant to § 547(b)(2).*

The Court finds and the parties have stipulated that the transfers were made on account of antecedent debts owed by the Debtors before the transfers were made.

C. *The Transfers Were Made While the Debtors Were Insolvent Pursuant to § 547(b)(3).*

On February 21, 1992, Balcor and the Trustee filed a Joint Pre-Trial Statement in which the parties stipulated that the transfers were made while the Debtors were insolvent. On March 12, 1992 (six days before trial), Balcor advised the Trustee that it no longer stipulated to the issue of insolvency. The Court finds that Balcor is properly bound by its stipulation of insolvency pursuant to Rule 7016(e), Fed.R.Bankr.P., and *Eastman Kodak Co. v. Westway Motor Freight*, 758 F.Supp. 641 (D.Colo. 1991). This Court, therefore, finds that the transfers were made while the Debtors were insolvent pursuant to Section 547(b)(3).

D. *Preference Period Pursuant to § 547(b)(4).*

1. *The Payments Were Made for the Benefit of Insiders-Guarantors and the Preference Period is, Thus, One Year Under Applicable Case Law.*

Pursuant to Section 547(b)(4), this Court finds that the preference period is properly extended to a year under 11 U.S.C. § 547(b)(4) under *In re Robinson Bros. Drilling, Inc.*, 97 B.R. 77 (W.D.Okla. 1988) *aff'd* 892 F.2d 850 (10th Cir. 1989). The Court finds that the payments to Balcor were made to or for the benefit of insiders who were guarantors of the Debtors. The parties have stipulated that Lawrence Fiedler is a general partner of the Debtors. The Court further finds that Meridith Organization is an insider of the Debtors. The guaranties were submitted as Trustee's Exhibits B and V.

The Court finds that Balcor's argument that the guarantors did not receive a benefit from the transfers because they were insolvent is without merit. As stated in *In re Octagon Roofing*, 124 B.R. 522, 532 (Bankr. N.D.Ill. E.D. 1991), there is nothing in the holding of *Levit v. Ingersoll Rand Financing Corp.*, 874 F.2d 1186 (7th Cir. 1989) (commonly known as the *DePrizio* case) or the cases following it which requires that the benefit to an insider be a direct monetary benefit.[1] Rather, a guarantor is benefited by forbearance of a lender in executing on the notes and guaranties and/or by the reduction of the outstanding liability.

The benefit to the guarantors is shown by the fact that since the payments were made, Balcor did not foreclose on

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[1] This Court recognizes the controversial nature of the *DePrizio* opinion and cases which follow it, as well as pending legislation in Congress to set aside the principles of this preference doctrine. Nonetheless, the case law in the Tenth Circuit is now clear and controlling in this matter.

the property or bring suit on the guaranties until after entry of the orders for relief from stay. The benefit is further evidenced by the Trustee's Exhibits DDDD, EEEE and FFFF which show that the release of the guaranties was a primary concern of the general partner guarantors during the year prior to the filing of the bankruptcy and were a primary issue in the negotiations for the return of the properties. The guarantors obviously believed there was a benefit to the release of the guaranties. These exhibits show that the guaranties were an issue of concern to both sides and that the guarantors received a benefit by the payments. The Court finds that this benefit was established by the Trustee and the preference periods are properly extended to a year.

2. *Balcor is Not an Insider as a Result of Qualifying as a "Person in Control of the Debtor".*

The Court finds that the preference period is not Properly extended to a year, as argued by Plaintiff, because Balcor was purportedly an insider under 11 U.S.C. §§ 101(31)(C) and 547(b)(4)(B). Section 101(31) defines "insider" to include a person who is in control of the debtor.

A trustee has the burden of proving that a creditor is an insider of the debtor in order to extend the preference period. 11 U.S.C. § 547(g). Section 101(31)(C) of the Bankruptcy Code defines an insider as: (i) a general partner in the debtor; (ii) a relative of a general partner in, general partner of, or person in control of the debtor; (iii) partnership in which the debtor is a general partner; (iv) general partner of the debtor; or (v) person in control of the debtor. 11 U.S.C. § 101(31)(C).

In order to determine whether a creditor assumed "control" of a debtor, a court must examine the totality of the circumstances. *See, In re Finn*, 909 F.2d 903, 909 (6th Cir.

1990); *In re Classic Drywall, Inc.*, 121 B.R. 69 (D.Kan. 1990); *Matter of Cavalier Homes of Georgia Inc.*, 102 B.R. 878, 883 (Bankr. M.D.Ga. 1989); *In re Beverages Int'l, Ltd.*, 50 B.R. 273, 282 (Bankr. D.Mass. 1985).

For a creditor to control a debtor, a creditor's conduct must be powerful and dominant, such that a debtor is rendered a mere instrumentality or incapable of making independent policy decisions. *See, In re Aluminum Mills Corp.*, 132 B.R. 869, 894 (Bankr. N.D.Ill. 1991); *In re Badger Freightways, Inc.*, 106 B.R. 971, 982 (Bankr. N.D.Ill. 1989); *In re Practical Investment Corp.*, 95 B.R. 935, 941 (Bankr. E.D.Va. 1989) (relationship must involve considerable control on the part of the creditor deemed to be an insider); *In re Sleepy Valley, Inc.*, 93 B.R. 925 (Bankr. W.D. Tex. 1988); *In re T.E. Mercer Trucking Co.*, 16 B.R. 176 (Bankr. N.D.Tex. 1981). The legislative history to Section 101(31) of the Bankruptcy Code further provides that an insider is one who does not deal at arms-length with a debtor. H.R. Rep. No. 595, 95th Cong., 1st Sess. 312 (1977).

A creditor will not be considered to control a debtor if the creditor merely exercises a "careful watch" over its borrower's activities. *See, Gray v. Giant Wholesale Corp.*, 758 F.2d 1000, 1003 (4th Cir. 1985) (creditor was not an insider or person in control simply because it controlled dispensation of a debtor's checks); *In re W.T. Grant Co.*, 699 F.2d 599, 610-611 (2nd Cir. 1983); *Practical Investment Corp., supra* at 941 (exercise of formal control incident to debtor-creditor relationship does not make creditor an insider); *In re Technology for Energy Corp.*, 56 B.R. 307, 316 (Bankr. E.D.Tenn. 1985) (court did not find "control" where creditor did not control contracts or personnel decisions, and was not involved in scheduling or purchase order decisions). *See also, Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990) (Seventh Circuit Court of Appeals held that a creditor did not engage in im-

permissible control where the creditor merely enforced the terms of its loan documents to the letter); *Matter of Clark Pipe and Supply Co., Inc.*, 893 F.2d 693 (5th Cir. 1990) (Fifth Circuit Court of Appeals held that a creditor did not exercise improper control where creditor made no management decisions and borrower handled daily operations).

This Creditor exercised a "careful watch;" it did not exercise control and effective management of policy and operations of the Debtors. Parsing through the evidence submitted by the Plaintiff on this issue reveals two principal items. First, the Creditor, Balcor, had good cause to carefully monitor operations and expenses of the Debtors, which it did diligently. Second, the Debtors retained and exercised ultimate authority and operational control over the Debtors; Debtors did not, it appears, cede authority or relegate control to Balcor. This Creditor did not, in its watch, usurp control over the Debtors' businesses and finances.

3. *The Transfers Enabled Balcor to Receive More Than it Would Have Received Under Chapter 7 Pursuant to 11 U.S.C. § 547(b)(5).*

The Court finds that the Trustee has established that Balcor received more than it would have received in a case under Chapter 7. The Court finds that Balcor's arguments that it did not receive more than it would have in a Chapter 7 because it had a perfected security interest in the rents are without merit. Balcor asserts that the filing of the Assignment of Rents perfected its interest in the rents. This is contrary to the Court's prior rulings and the case law.

The evidence is clear that on the date of filing of the Petitions, Balcor was a nonrecourse creditor of both estates and accordingly in a Chapter 7 would not be entitled to any payment on an unsecured claim. The evidence further shows that at all times relevant to these proceedings,

Balcor was an undersecured creditor. The fact that at the filing of the Petition Balcor was an undersecured creditor is shown by the proofs of claim filed by Balcor in the bankruptcy proceedings showing in the Meridith Millard case an unsecured claim of $5,024,759.84 and in the Meridith Hoffman case an unsecured claim of $1,429,223.58.

The Court finds in accordance with *In re Lewis W. Shurtleff, Inc.*, 778 F.2d 1416 (9th Cir. 1985); *In re Buyer's Club Markets, Inc.*, 123 B.R. 895 (Bankr. D.Colo. 1991) that as long as the distributions in a Chapter 7 bankruptcy proceeding are less than 100%, payment to an unsecured creditor enables it to receive more than it would have received in a Chapter 7. The Court further finds that with an undersecured creditor, payments are credited first to the unsecured portion of the debt, *Drabkin v. A.I. Credit Corp.*, 800 F.2d 1153 (D.C. Cir. 1986); *In re Fitzgerald*, 49 B.R. 62 (Bankr. D.Mass. 1985).

The uncontroverted testimony of the Trustee, H. Christopher Clark, clearly shows that in these cases the payments to the unsecured creditors will be less than 100 percent.

The Court finds that although Balcor had recorded Assignments of Rents, Balcor did not perfect its interest in the rents until the post-petition filing of its notices pursuant to 11 U.S.C. § 546(b). The issue as to when the interest in rents was perfected was previously decided in the Meridith Millard case and the Court takes judicial notice of Judge Charles E. Matheson's finding that the Assignments of Rents were perfected as of the date of filing of the Section 546(b) notice. The Court further finds that Balcor is bound by its Agreed Order in the Meridith Millard case, Exhibit GGGG. In the Meridith Hoffman case, the Court finds that under Colorado law, Balcor did not perfect its interest in the rents until the filing of the Section 546(b) notice pursuant to *Consolidated Capital Income Trust v. Colter, Inc.*,

47 B.R. 1008 (D.Colo. 1985), citing *Fisher v. Norman Apartments, Colorado Nat'l Bank of Denver*, 101 Colo. 173, 72 P.2d 1092 (1937). It is clearly established under Colorado law that the filing of an assignment of rents does not perfect an interest in the rents. The evidence shows that Balcor did not take any action legally sufficient to perfect its interest pre-petition. *In re Jefferson Business Center Associates*, 135 B.R. 676 (Bankr. D.Colo. 1992); *In re Morning Star Ranch Resorts*, 64 B.R. 818 (Bankr. D.Colo. 1986).

The Court finds that the payments made should be applied to the unsecured portion of the claims. Since the payments to creditors are to be less than 100 percent, and Balcor is a nonrecourse creditor, the Trustee has met his burden under 11 U.S.C. § 547(b)(5). The Court finds that the transfers are voidable preferences under 11 U.S.C. § 547(b).

4. *The Transfers Were Not Made in the Ordinary Course of Business.*

Balcor has asserted that the payments were made under the ordinary of business pursuant to 11 U.S.C. § 547(c)(2). A finding that the payments were in the ordinary course requires a showing that they were made in the ordinary course of the Debtors' business, made in the ordinary course of the creditor's business, made according to ordinary business terms, and made in the ordinary course of business. *Union Bank v. Wolas*, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991). The Court finds that Balcor has failed to meet its burden of proof on this issue.

Payments which arise out of unusual debt collection or payment practices do not fall within the scope of 11 U.S.C. § 547(c)(2). *In re Craig Oil Co.*, 785 F.2d 1563 (11th Cir. 1986) (cited in *In re Miniscribe*, 123 B.R. 86 (Bankr. D.Colo. 1991)); *In re LCO Enterprises*, 116 B.R. 188 (Bankr. N.D. Cal. 1990); *In re Pioneer Technology, Inc.*, 107 B.R. 698 (9th

Cir. BAP 1988); *In re Bob Grissett Golf Shoppes, Inc.*, 78 B.R. 787 (Bankr. E.D.Va. 1987).

Balcor admitted in its Brief opposing the Trustee's Motion for Summary Judgment that the loans were in default at the time of the execution of the Escrow Agreements. The Court finds that the Escrow Agreements comprise an unusual debt collection practice utilized by Balcor to help protect its claims once the loans were in default. The Escrow Agreements fall outside the ordinary course of business exception. They were not "ordinary course" as to Balcor, to the parties' business relationship, as well as to ordinary business terms, custom or practice.

There is no evidence before the Court that establishes it is in the ordinary course of business between a debtor and a lender to operate under Escrow Agreements of this nature or lock box-type arrangements unless the loans are in default. The Court further finds that if the Escrow Agreements were in the ordinary course of business between the Debtors and Balcor that the Escrow Agreements would have been entered into at the outset of the loans, not when the loans were in default. Although the Balcor-Hoffman Note was executed on January 30, 1985, the Escrow Agreement was not entered into until October 3, 1986. Despite the fact that the Escrow Agreement for Meridith Hoffman was executed in October 1986, the Meridith Millard Escrow Agreement was not executed until December 1, 1987. The Court accordingly finds that the Escrow Agreements and therefore the payments made thereunder were not in the ordinary course of business and were not made according to ordinary business terms and therefore that Balcor has failed to establish its burden of proof to establish the defense under 11 U.S.C. § 547(c)(2).

In applying an analysis utilized in *In re Miniscribe*, *supra*, Balcor has not presented any credible and persua-

sive evidence that the loans were incurred and the payments made in the ordinary course of the Debtors' business. The Court further finds that the payments were not made in the ordinary course of business under 11 U.S.C. § 547(c)(2). As noted in *Miniscribe*, the intent of Section 547(c)(2) is to protect "recurring customary credit transactions that are incurred or paid in the ordinary course of business of the Debtor and the Debtor's transferee." (Collier on Bankruptcy, ¶ 547.10 (15th Ed. 1990)).

For the reasons set forth above, it is

ORDERED that the transfers to Balcor in the amount of $140,128.94 by Meridith Hoffman are preferential transfers pursuant to 11 U.S.C. § 547(b) and Balcor shall, within 30 days of the date this Order becomes final and non-appealable, return to Meridith Hoffman the $140,128.94 it received plus interest at the statutory rate from the date of the transfers.

IT IS FURTHER ORDERED that the transfers to Balcor in the amount of $251,722.44 by Meridith Millard are preferential transfers pursuant to 11 U.S.C. § 547(b) and Balcor shall, within 30 days of the date this Order becomes final and non-appealable, return to Meridith Millard the $251,722.44 it received plus interest at the statutory rate from the date of the transfers.

IT IS FURTHER ORDERED that judgment shall enter accordingly.

Dated this 30th day of April, 1992.

BY THE COURT:

Sidney B. Brooks
United States Bankruptcy Judge

[Dated April 30, 1992]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	Bankruptcy Case No.
	)	89-B-06180-C
MERIDITH HOFFMAN PARTNERS,	)	89-B-06181-E
a Colorado general partnership,	)	
and	)	
MERIDITH MILLARD PARTNERS,	)	
a Nebraska general partnership,	)	
	)	
Debtors.	)	
	)	
----------	)	
	)	
H. CHRISTOPHER CLARK, Trustee	)	
of the Bankruptcy Estates of	)	
Meridith Hoffman Partners and	)	
Meridith Millard Partners,	)	
	)	
Plaintiff,	)	
	)	Adversary Proceeding
v.	)	No. 91-1338-SBB
	)	
BALCOR REAL ESTATE	)	
FINANCE, INC.,	)	
an Illinois corporation,	)	
	)	
Defendant.	)	

JUDGMENT

The above-captioned matter came to trial before the Court regarding the Plaintiff/Trustee's claims against Defendant.

The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment shall enter in favor of the Plaintiff against the Defendant for preferential payments in the following amounts:

i) Meridith Hoffman within 90 days, $18,000.00 as follows:

03/30/89	$ 8,000.00
04/28/89	$ 10,000.00

ii) Meridith Hoffman within one year, $122,128.94 as follows:

05/16/88	$ 27,572.69
06/14/88	$ 28,491.78
09/06/88	$ 27,572.69
10/14/88	$ 28,491.78
01/09/89	$ 10,000.00

iii) Meridith Millard within 90 days, $50,500.00 as follows:

03/02/89	$ 30,000.00
03/30/89	$ 5,500.00
04/19/89	$ 15,000.00

iv) Meridith Millard within one year, $201,222.44 as follows:

10/27/88	$126,722.44
11/15/88	$ 15,500.00
12/20/88	$ 31,000.00
01/26/89	$ 28,000.00

Dated this 30th day of April, 1992.

FOR THE COURT:

Bradford L. Bolton, Clerk

By:_____
Deputy

APPROVED AND ACCEPTED:

By:_____
Sidney B. Brooks
U.S. Bankruptcy Judge

11 U.S.C. ¶ 547

§ 547. Preferences

***

(c) The trustee may not avoid under this section a transfer-

(1) to the extent that such transfer was-

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was-

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor-

(A) to the extent such security interest secures new value that was-

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor-

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of-

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

***